

Han (Migration) [2020] AATA 1933 (11 March 2020)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Ms Qing Han
Ms Naoko Kawamura

CASE NUMBER: 1728472

DIBP REFERENCE(S): CLF2013/241505

MEMBER: Stephen Witts

DATE: 11 March 2020

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the applications for Partner (Residence) (Class BS) visas for reconsideration, with the direction that the first named applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.221 of Schedule 2 to the Regulations
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• Statement made on 11 March 2020 at 9:11am

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CATCHWORDS

MIGRATION – Partner (Residence) (Class BS) visa – Subclass 801 (Partner) – genuine and continuing spouse relationship – joint purchase of an apartment – pooling of financial resources – joint care of the applicant’s daughter – sponsor carer of his mother – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5F, 65
Migration Regulations 1994, Schedule 2, cl 801.221; r 1.15

CASES

He v MIBP [2017] FCAFC 206

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STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 6 November 2017 to refuse to grant the applicants Partner (Residence) (Class BS) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named applicant (the applicant) applied for the visa on 1 October 2013 on the basis of her relationship with her sponsor. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.801.221 because the delegate was not satisfied that the applicant and sponsor were in a genuine spousal or de facto relationship.
4. The applicant appeared before the Tribunal on 10 March 2020 to give evidence and present arguments.
5. The Tribunal also received oral evidence from the sponsor Mr Wei Zhu, and family members of the sponsor and the applicant Ms Ping Zhu and Ms Yun Zhu, and the applicant's daughter Ms Naoka Kawamura.
6. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
7. The applicants were represented in relation to the review by their registered migration agent.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in the present case is whether the applicant and the sponsor are in a genuine spousal or de facto relationship.

SPOUSE/DEFACTO (cl.801.221(2))

Whether the parties are in a spouse or de facto relationship

10. Relevantly to this matter, cl.801.221(2)(c) requires that at the time of this decision, the applicant is the spouse of the 'sponsoring partner', who must be an Australian citizen or Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor is the 'sponsoring partner' of the applicant.
11. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there

must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a) - (d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

12. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship.
13. The applicant and the sponsor have provided a marriage certificate dated 1 September 2013 which took place in Victoria Street Richmond Victoria.
14. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

15. According to the delegate's decision record dated 6 November 2017, provided to the Tribunal by the applicants, the primary applicant, Ms Qing Han, lodged a valid application for a Partner (Temporary) (Class UK) (Subclass 820) visa and a Partner (Residence) (Class BS) (Subclass 801) visa on the grounds of being in a spousal relationship with an Australian citizen, Mr Wei Zhu (the sponsor), who lodged a sponsorship in support of the application. The applicant was granted a subclass 820 visa on 29 April 2014.
16. According to the delegate the applicant and the sponsor have provided little evidence that they are in a genuine and committed de facto or spousal relationship and on that basis the application was denied.
17. The Tribunal has considered all the evidence provided at hearing, as well as evidence provided in the delegate's file and the AAT file.
18. In particular the Tribunal has considered the following information in the delegate's file: various photos in social and holiday situations, various statutory declarations from family, friends and associates, statutory declarations from the applicant and sponsor, material from the Department, flight information, utility information, bank account information, material regarding family benefits, material regarding purchase of property, tenancy information social media and phone information, a statement from the applicant dated 26 September 2013, a marriage certificate on 1 September 2013, and other material and information. The Tribunal has also considered information provided in the AAT file including property ownership details, various statutory declarations, financial information of joint bank accounts, and other material.
 - Financial aspects of the relationship - including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
19. The Tribunal had a discussion with the applicant and the sponsor regarding financial aspects of the relationship. The applicant and sponsor provided evidence that they jointly signed a contract to purchase an apartment in South Yarra "off the plan" and that they then changed the ownership of this property once it had been completed to the applicant's daughter's name as it was purchased primarily with money that the daughter inherited after the death of

her father. The parties also provided evidence via their joint bank accounts with the ANZ bank and the Commonwealth Bank that they have jointly provided monies to this account to assist in the purchase of this property. It is also noted by the Tribunal that there are up-to-date bank account statements with transactions from both these accounts from both parties and significant funds both coming in and out of these joint accounts that are used for the maintenance of their property and for day-to-day and more long-term household and lifestyle expenses. The parties also provided evidence of joint life insurance policies and other material which also added weight to the financial relationship between the parties.

20. The Tribunal has considered this information and notes concerns previously expressed by the delegate in regard to the how these accounts are used and of the purchase of the property. The Tribunal also notes that technically this property where the applicant and sponsor are living with her daughter is in her daughter's name and not in joint names. However after consideration of this information taken as a whole, in particular the recent evidence provided, satisfies the Tribunal that the parties do have joint ownership of assets and that they do have a pooling of financial resources built up over a period of time that lends weight to the contention that the applicant and the sponsor are in a genuine spousal relationship.
 - Nature of the household - including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
21. The applicant and the sponsor provided to the Tribunal evidence that they have lived together in the same house with the applicant's daughter for some years now and have provided up to date evidence that they are still living in this apartment in South Yarra which they purchased some time ago. The applicant and the sponsor also provided evidence that they do jointly care for the applicant's daughter, that they have joint living arrangements and that they share house work and other household matters together. The Tribunal had separate discussions with the applicant and the sponsor regarding the nature of the household, and after consideration of the separate discussions, and the evidence presented by other parties at the hearing, satisfied the Tribunal that the applicants were living as spouses in the applicant's daughter's owned apartment.
22. The Tribunal finds that this lends weight to the contention that the applicant and the sponsor are in a genuine spousal relationship.
 - Social aspects of the relationship - including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
23. The Tribunal heard evidence from the applicant and the sponsor, and also from several nominated witnesses that satisfied the Tribunal that there are social aspects of this relationship and that the parties do represent themselves to other people as being married to each other and that is the opinion of friends, family, and acquaintances about the nature of their relationship. The nominated witnesses will also provided evidence that they have planned and undertaken joint social activities for some years.
24. The Tribunal finds that this lends weight to the contention that the applicant and sponsor are in a genuine spousal relationship.
 - Nature of persons' commitment to each other - including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

25. The Tribunal had a discussion with the applicant and the sponsor about the nature of their commitment to each other, and also had discussions with the nominated witnesses in regard to this matter and finds that the applicant and the sponsor has been together since they were married in 2013 and have lived together for all that time; and that they do draw a degree of companionship and emotional support from each other and do see their relationship as long-term.
26. The Tribunal finds that this lends weight to the contention that the applicant and the sponsor only genuine spousal relationship.
- Any other circumstances of the relationship.
27. The Tribunal had a detailed discussion with the sponsor in regard to the reason why he had provided incorrect information of his address on his incoming passenger card. The Tribunal noted to the applicant that it was concerned by this information. After a discussion with the sponsor and after receiving further evidence of clarification the Tribunal was satisfied as to the reasons why this information was provided in this format. The Tribunal finds that this is not evidence in itself that the applicant and sponsor were not in a genuine spousal relationship.

28. *Issue of Concern*

29. The Tribunal had a detailed discussion with the sponsor about his living arrangements in South Yarra and his working arrangements in Burwood where he travelled every day, he says, to look after his mother as a carer taking several forms of public transport to get there. The Tribunal was unconvinced that the sponsor is a genuine carer of his mother as his mother is living with his sister and he in South Yarra with his wife in a situation that the Tribunal doubts contributes to the care of his mother. He was also not able to actually say what he actually did for his mother other than helping her take medication and such. This was of concern to the Tribunal because the Tribunal was attempting to elucidate the genuine living arrangements of the sponsor and was initially concerned that the sponsor may in fact have been living with his mother in Burwood and not with his wife in South Yarra. Upon consideration of this factor and also after discussion with various other parties at the hearing the Tribunal is satisfied that the sponsor was living in a spousal relationship with his wife in South Yarra but was providing evidence in regard to his work life with his mother in Burwood to facilitate the fiction that he was at Burwood six days a week to receive his carers allowance not to hide the fact that he was living there. After consideration of this evidence the Tribunal finds that the applicant and the sponsor were living together in South Yarra as a couple and this lent weight to the contention that the applicant and the sponsor were in a genuine spousal relationship.
30. The Tribunal has considered the evidence provided by the applicant and the sponsor and nominated witnesses at the hearing, and the evidence provided in the delegate's file and in the AAT file, in particular evidence provided recently to the Tribunal, and finds that the applicant and the sponsor do have a mutual commitment to a shared life to the exclusion of others, that they do have a genuine and continuing relationship, and that they do intend to live together and not separately and apart on a permanent basis.
31. Given these findings the Tribunal is satisfied that the requirements of s.5F(2) are met at the time of this decision. Therefore the applicant does meet cl.801.221(2)(c).
32. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

33. The Tribunal remits the applications for Partner (Residence) (Class BS) visas for reconsideration, with the direction that the first named applicant meets the following criteria for a Subclass 801 (Partner) visa:
 - cl.801.221 of Schedule 2 to the Regulations
34. In regard to the secondary applicant the Tribunal finds that she is a member of the family unit of a person who satisfies the primary criteria.

Stephen Witts
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).